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No. _____

In The

Supreme Court of the United States

RAZA HUSAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Husain's convictions and sentences for both possessing *and* transferring the same machineguns violate the Double Jeopardy Clause?

2. Did the Fifth Circuit apply the proper standard of review when evaluating Husain's double jeopardy challenge?

3. Was the evidence sufficient to sustain Husain's conviction for witness tampering under 18 U.S.C. § 1512(b)(3)?

4. Did the Fifth Circuit utilize the appropriate definition of *corruptly* when assessing Husain's sufficiency claim under 18 U.S.C. § 1512(b)(3)?

5. Was the evidence sufficient to show that the individual corruptly persuaded was a *witness*, as required by the jury instructions?

6. Can firearms that fall outside the scope of the charged offense be considered when calculating a U.S.S.G. § 2K2.1(b)(1) enhancement?

7. Can firearms that were seized because of record-keeping violations, and later made the subject of a civil forfeiture, be used when calculating a § 2K2.1(b)(1) enhancement?

8. Can firearms that were seized because of record-keeping violations, and later made the subject of a civil forfeiture, be deemed relevant conduct under U.S.S.G. § 1B1.3?

9. Was there an adequate evidentiary basis to support the Fifth Circuit's conclusion that twenty-seven firearms could be utilized in determining Husain's total offense level?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioner, Raza Husain, and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Raza Husain respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The Fifth Circuit's opinion is not published.[1]

JURISDICTION

The Court of Appeals entered its judgment on December 5, 2000.[2] A motion for *en banc* rehearing was filed on February 22, 2001. That motion was denied on March 14, 2001.[3]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Husain seeks review from a final federal court decision in a criminal case.

CONSTITUTIONAL AMENDMENT INVOLVED

The Fifth Amendment to the United States Constitution provides that: "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . "

STATEMENT OF THE CASE

I. Procedural Background

Husain was charged – in four separate counts – with the unlawful possession and transfer of six

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[1] *See* Appendix at pages 1-25.

[2] *Id.*

[3] *See* Appendix at pages 28-29.

machineguns.[4] Count one alleges that on February 24, 1996, Husain unlawfully possessed a machinegun. Count two charges that on the same date, Husain illegally transferred a machinegun. Counts three and four allege the unlawful possession and transfer of five machineguns; once again, both the possession and transfer occurring on the same date.[5] He was also indicted for witness tampering.[6]

A jury found Husain guilty on all five counts.[7] Punishment was assessed at seventy-one months for the firearms violations, and twelve months for witness tampering – all to run concurrently.[8] Husain's convictions were affirmed by the Fifth Circuit in an unpublished opinion.[9]

II. Summary of Facts

Raza Husain started his own security company in 1984.[10] He became a licensed firearms dealer in 1990.[11]

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[4] *See* 18 U.S.C. § 922(o), which makes it "unlawful for any person to transfer or possess a machinegun." *See also* Appendix at pages 31-35 (Superseding indictment).

[5] *See* Appendix at pages 30-32.

[6] *See* 18 U.S.C. § 1512(b)(3).

[7] *See* Appendix at pages 35-36. Before trial, Husain pleaded guilty to a misdemeanor record-keeping violation (count five). An additional tampering count was dismissed (count six). *See Record on Appeal,* Vol. 3 at page 243.

[8] *See* Appendix at pages 37-49.

[9] *See* Appendix at pages 1-25.

[10] *Record on Appeal, Vol. 4 at page 149.*

[11] *Record on Appeal, Vol. 4 at page 149.*

But being a licensed firearms dealer was to be a side business. Husain only sold about seventy guns a year.[12]

Husain first met Mr. Abdulhady in 1993, when he (Husain) sold several firearms to him.[13] In February 1996, Abdulhady contacted Husain and told him that he had a buyer for SKS's.[14] Husain gave Abdulhady a sample SKS to show the buyer and then waited to hear back from Abdulhady.[15] Abdulhady contacted Husain a couple days later and ordered five more guns.[16]

Husain met Abdulhady at his video store during regular business hours to deliver the five guns.[17] The guns were delivered wrapped only in paper, as requested by Abdulhady.[18] Abdulhady later contacted Husain and requested the original boxes for the guns, the stocks, and their magazines.[19] Husain delivered these items to Abdulhady at his home.[20]

Each gun cost Husain $99.00. He sold them to Abdulhady for $115.00 each, who then increased the price to $1500.00 apiece when he sold them to his buyers. None of this profit was passed on to Husain.[21]

The Government received information from a confidential informant that Abdulhady was selling

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[12] *Record on Appeal, Vol. 4 at page 149.*

[13] *Record on Appeal, Vol. 4 at page 150.*

[14] *Record on Appeal, Vol. 4 at page 153.*

[15] *Record on Appeal, Vol. 4 at page 153.*

[16] *Record on Appeal, Vol. 4 at page 154.*

[17] *Record on Appeal, Vol. 4 at page 156.*

[18] *Record on Appeal, Vol. 4 at page 156.*

[19] *Record on Appeal, Vol. 4 at page 156.*

[20] *Record on Appeal, Vol. 4 at page 156.*

[21] *Record on Appeal, Vol. 4 at page 154.*

machineguns.[22] The informant put Abdulhady in contact with an undercover agent and arrangements were made for the agent to purchase machineguns.[23] Abdulhady was subsequently arrested and convicted for the possession and transfer of machineguns.[24]

At some point, the Government obtained a search warrant for Husain's residence.[25] During the search, the Government seized – amongst other things – twelve guns belonging to Husain's personal collection.[26] These guns eventually became the subject of a forfeiture proceeding.[27] After the forfeiture case was concluded, and approximately two years after Abdulhady's arrest, charges were brought against Husain.

Additional facts will be set forth as they become relevant to the particular questions presented for review.

III. The Federal Questions Presented

A. Double Jeopardy

Count one of the indictment alleges that on February 24, 1996, Husain unlawfully possessed a machinegun. Count two charges that on the same date, Husain illegally transferred a machinegun. Counts three and four allege

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[22] *Record on Appeal, Vol. 3 at page 107.*

[23] *Record on Appeal, Vol. 3 at pages 193; 199.*

[24] *Record on Appeal, Vol. 4 at page 25.*

[25] *Record on Appeal, Vol. 4 at page 160.*

[26] *Record on Appeal, Vol. 4 at page 160.*

[27] *Record on Appeal, Vol. 4 at page 160-161.*

the unlawful possession and transfer of five machineguns; once again, both the possession and transfer occurring on the same date.[28] The evidence at trial established that the weapons which were the subject of the possession counts, were the same as those that formed the basis for the transfer counts.

Husain believes that his convictions and resulting sentences for possessing and transferring machineguns violate the Fifth Amendment's double jeopardy prohibition. He reasons that it is impossible to *transfer* a machinegun without first having *possessed* it. The Fifth Circuit concluded that no infraction was shown. Does this finding conflict with the Court's decision in *Ball*?[29]

B. Witness Tampering

Was the evidence sufficient to sustain Husain's conviction for witness tampering under 18 U.S.C. § 1512(b)(3)? This question turns – in part – on the appropriate definition of *corruptly*, and how that term should be applied in the present context. In short, was it proven that Husain *corruptly* persuaded the witness? The sufficiency problem also focuses on whether the individual so persuaded needs to be either a *witness* or *prospective witness*, if the jury charge so requires.

The Fifth Circuit found adequate proof to support the conviction. Does this result conflict with the Third Circuit's opinion in *Farrell*?[30] And if so, is the question's importance exceptional enough to warrant consideration by this Court?

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[28] *See* Appendix at pages 30-34.

[29] *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668 (1985).

[30] *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

C. Sentencing

Husain contends that the Presentence Investigation Report (PSR) inaccurately calculated the number of firearms which were considered in assessing his total offense level. The paramount problem is whether firearms outside the scope of the charged offense can be considered when calculating a § 2K2.1(b)(1) enhancement. A further concern is based on the inclusion of twelve firearms that were seized because of record-keeping violations, and later made the subject of a civil forfeiture. Can these twelve firearms properly be considered part of the same course of conduct, common scheme, or plan as the offense of conviction?[31]

Husain's troubles with the sentence enhancement are further buttressed by the flimsy facts supporting the PSR's conclusion that he possessed nine machineguns in addition to the six confiscated in this case – facts that the Fifth Circuit improperly held Husain responsible for refuting. The court ultimately decided that there was an adequate evidentiary basis to support the trial court's conclusion that twenty-seven firearms could be utilized in determining the total offense level. Is this result in conflict with the decisions from other courts of appeals that have considered similar issues?

REASONS FOR GRANTING THE PETITION

1. Husain's convictions for *possession* of machineguns were obtained in violation of the Double Jeopardy Clause because he was found guilty of *transferring* the same guns, and it is impossible to transfer a machinegun without first having possessed it. This logic is consonant

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[31] *See* U.S.S.G. § 1B1.3(a)(2).

with the decision in *Ball*.[32] Yet the Fifth Circuit concluded otherwise. In so doing, the court confused *Ball* and misapplied the plain-error doctrine.

This Court should grant review so that it can decide whether double jeopardy protections apply in this particular setting. It should likewise confront the extent to which the plain-error rule drives a double-jeopardy analysis.

2. Husain was convicted of witness tampering in violation of 18 U.S.C. § 1512(b)(3). He contends that the word *corruptly*, as utilized in the statute, demands proof of threats, force, bribery, extortion, or other means of dishonest persuasion that would tend to show the obstruction of justice. Can a conviction for a Section 1512(b)(3) violation be sustained absent such proof? This appears to be a question of first impression for the Court. And friction exists between the Fifth and Third Circuits' resolution of the subject.

A companion inquiry in the witness-tampering forum is whether the corrupt persuasion must be directed to one who is either a witness, or a prospective witness, if the jury is so instructed.

The Court should grant this petition so that the parameters of witness tampering under § 1512(b) can be examined and resolved in light of the circumstances presented by this unusual case. There are – without doubt – issues of exceptional importance to be faced.

3. Husain contests his sentence on essentially three grounds. The first and most prominent problem is whether firearms outside the scope of the charged offense can be considered when calculating a § 2K2.1(b)(1) enhancement. A subset concern is based on the PSR's

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[32] *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668 (1985).

inclusion of twelve firearms that were seized because of record-keeping violations, and later made the subject of a civil forfeiture. Can these twelve firearms properly be viewed as part of the same offense under § 2K2.1(b)(1)? And if not, should they be evaluated for purposes of determining relevant conduct?[33] These inquiries will lead into territories not yet explored by the Court. And each will compel the interpretation and resolution of conflicting decisions amongst the circuit courts.

Alternative concerns – which need only be addressed if the preceding arguments prove unfavorable to Husain – are the troubles with the factual underpinnings for the sentence enhancement; facts that the Fifth Circuit improperly held Husain responsible for refuting. The court ultimately decided that there was an adequate evidentiary basis to support the trial court's conclusion that twenty-seven firearms could be utilized in determining the total offense level. Does this result conflict with the decisions from other courts of appeals that have considered similar issues?

ARGUMENTS SUPPORTING REASONS FOR REVIEW

I. Double Jeopardy

The Fifth Amendment provides, in part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The constitutional prohibition against *double jeopardy* is designed to protect an individual from being exposed to the hazards of trial and possible conviction more than once for an alleged offense.

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[33] *See* U.S.S.G. § 1B1.3(a)(2).

Generally speaking, under the test enunciated in *Blockburger*,[34] two offenses do not constitute the same offense for double jeopardy purposes, if each infraction contains an element that the other does not.[35] Where a defendant's conduct allegedly violates the same statute more than once, it must be determined if that conduct constitutes more than one offense as a matter of statutory interpretation.

Husain insists that his convictions and sentences for both possessing *and* transferring the same machineguns violate the Double Jeopardy Clause, since it is impossible to transfer a machinegun without first having possessed it.

A. Plain-error doctrine

1. Husain's convictions

The Fifth Circuit begins its analysis by characterizing Husain's attack on his *convictions* as one involving multiplicity. And since his objection at trial "failed to sufficiently apprise the district court of the specific argument [urged on appeal]," the court refused to evaluate his argument – even under the plain-error doctrine.[36] But the court's decision in *Lankford*[37] explicitly states that double jeopardy issues – raised for the first time on appeal – are

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[34] *Blockburger v. United States*, 284 U.S. 299 (1932).

[35] *See United States v. Dixon*, 509 U.S. 688, 696 (1993).

[36] *See* Appendix at page 9.

[37] *United States v. Lankford*, 196 F.3d 563 (5th Cir. 1999).

reviewed for plain error.[38] And the same is true for complaints about multiplicity, which should be analyzed *de novo*.[39]

The court's attempt to seek refuge in *Soape*[40] is misplaced. *Soape* in fact held that issues of multiplicity were to be reviewed *de novo* – except when it is asserted as a defense and "goes to [the] indictment alone," in which case it must be raised prior to trial.[41] But when such complaints touch upon both the indictment *and* the sentence, the resulting *convictions* are likewise reviewed *de novo*.[42] And that is exactly the case here. Husain challenged his convictions *and* sentences. Whatever the distinction between *Lankford* and *Soape* may be, it remains clear that when double jeopardy issues are implicated, at least a plain-error inquiry should be conducted.

It is not known why the Fifth Circuit strayed from its well-settled precedent in this case. Other circuits have consistently adopted a less rigorous approach when evaluating double jeopardy claims. This is not surprising given the unquestioned magnitude of the protection.

For example, the Tenth Circuit scrutinizes multiplicity claims, "to the extent they raise the *possibility of multiple sentences* for the same offense," even if the challenge was not raised prior to trial.[43] Such attacks go to the

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[38] *Lankford*, 196 F.3d at 577.

[39] *Id.*

[40] *United States v. Soape*, 169 F.3d 257 (5th Cir. 1999), cited in Appendix at page 9.

[41] *Id.* at 265-266.

[42] *Id.*

[43] *United States v. Morehead*, 959 F.2d 1489, 1506 (10th Cir. 1992) (emphasis added).

fundamental validity of a conviction.[44] And a criminal conviction – in and of itself – presents " 'potentially adverse collateral consequences.' "[45] So even the mere threat of multiple sentences for the same offense implicates double jeopardy concerns.[46]

In *White*,[47] the Second Circuit encountered a double jeopardy assault on the defendant's convictions for drug distribution. The quarrel was raised for the first time on appeal. Since it was not presented to the trial court, a plain-error standard was employed.[48]

The Fifth Circuit's conclusion is far afield from the approaches adopted by the Second and Tenth Circuits. Husain should be permitted to challenge his *convictions* as multiplicitous. The convictions portend punishment, and the better part of reason compels the implementation of a *de novo* review. At the very least, a plain-error analysis is warranted.

2. Husain's sentences

The Fifth Circuit does adopt a plain-error rubric when confronting Husain's double jeopardy claim with respect to his multiple *sentences*.[49] It ultimately concludes that if there was error, it was not plain because "we have been unable to find any definitive authority addressing

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[44] *Morehead*, 959 F.2d at 1506.

[45] *Id., quoting Ball*, 470 U.S. at 865, 105 S.Ct. at 1673.

[46] *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 221, 227 (1977).

[47] *United States v. White*, 240 F.3d 127 (2nd Cir. 2001).

[48] *Id.* at 132.

[49] *See* Appendix at page 10.

whether transferring and possessing under § 922(o) constitute separate offenses under *Blockburger*."[50] Even if plain error existed, the court reasons that Husain was not prejudiced because all of his sentences are concurrent.[51] This determination clashes with the Second Circuit's judgment in *White*. And – as will be demonstrated later – the entire analysis collapses under the weight of *Ball v. United States*.[52]

The defendant in *White* disputed his convictions for 1) drug distribution under 21 U.S.C. § 841(a) and 2) drug distribution within 1000 feet of a school in violation of 21 U.S.C. § 860.[53] He argued – on double jeopardy grounds – that his conviction for simple distribution was duplicative of the schoolyard offense.[54] Because the complaint was not tendered to the trial court, the Second Circuit conducted its appraisal according to the plain-error doctrine.

The court first found that there was error. Simple distribution is a lesser-included offense of the schoolyard violation. The defendant, therefore, could not be convicted under 21 U.S.C. § 841(a) and 21 U.S.C. § 860 for the same transaction.[55] This error was *plain* because the overlap between the two offenses appeared on the face of the indictment.[56] And it "certainly also affects 'substantial rights' – here, the right of the defendant under the Fifth Amendment not to be convicted twice for the same

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[50] *See* Appendix at page 11.

[51] *See* Appendix at page 13.

[52] *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668 (1985).

[53] *Id.* at 130.

[54] *Id.* at 132.

[55] *Id.* at 133.

[56] *Id.*

offense. Moreover, the error seriously affects the fairness of judicial proceedings."[57] The offending judgments were vacated and the case was remanded to the trial court.

The analogy here is strong. Husain's convictions violate double jeopardy prohibitions. One simply cannot transfer a firearm without first possessing it.[58] Any doubt about this proposition will soon be dispelled by the ensuing discussion. And the flaw is evident from the face of the indictment. Count one alleges that on February 24, 1996, Husain unlawfully *possessed* a machinegun.[59] Count two charges that on the same date, Husain illegally *transferred* a machinegun.[60] Counts three and four allege, respectively, the unlawful possession and transfer of five machineguns; once again, both the possession and transfer occurring on the same date.[61]

Under the rationale of *White*, Husain's substantial rights were adversely affected by the patent Fifth Amendment infraction. This breach – in turn – seriously implicates the fairness, integrity, and public reputation of judicial proceedings. How could the violation of such a rudimentary right be viewed otherwise?

3. Conclusion

The Fifth Circuit misconstrued the plain-error principle when evaluating Husain's double jeopardy argument.

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[57] *White*, 240 F.3d at 133.

[58] *See Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668 (1985).

[59] *See* Appendix at page 30.

[60] *See* Appendix at pages 30-31.

[61] *See* Appendix at pages 31-32.

The court confused its operation in the context of Husain's *convictions*, and misapplied its prongs when considering his *sentences*. In the process, a decision was spawned that is in direct conflict with another circuit court opinion. This Court should grant review and ease the friction.

B. *Ball v. United States* controls

The Fifth Circuit was mistaken when it said "we have been unable to find any definitive authority addressing whether transferring and possessing under § 922(o) constitute separate offenses under *Blockburger*."[62] The answer to their search lies squarely within the confines of this Court's decision in *Ball*.

In *Ball*, this Court faced the issue of whether "a felon possessing a firearm may be *convicted* and *concurrently sentenced* under 18 U.S.C. § 922(h)(1) for receiving that firearm, and under 18 U.S.C. § 1202(a)(1) for possessing the same weapon."[63] The Court began its analysis by observing that a defendant could be simultaneously prosecuted for violations of 18 U.S.C. § 922(h) and 18 U.S.C. § 1202(a)(1) – even if the same firearm was involved. But while this may be true, the Court found – relying on *Blockburger*[64] – that Congress did not intend to subject a defendant to *two convictions*, because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon."[65]

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[62] *See* Appendix at page 11.

[63] *Ball*, 470 U.S. at 857, 105 S.Ct. at ___ (emphasis added) (citations omitted).

[64] *Blockburger v. United States*, 284 U.S. 299 (1932).

[65] *Ball*, 470 U.S. at 862, 105 S.Ct. at ___ (emphasis in original).

> Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act.[66]

Hence, it was held that: "[W]here a single act establishes the receipt and possession, the accused may not suffer *two convictions or sentences* on that indictment."[67] The case was remanded for the district court to decide which conviction and sentence to vacate.

The comparison here is seamless. 18 U.S.C. § 922(o) provides that "it shall be unlawful for any person to transfer or possess a machinegun." The violations – possession and transfer – are contained in the same statute. And Congress has not established separate punishments. Section 924(a)(2) sets a ten-year maximum sentence for all § 922(o) transgressions. Reason would therefore dictate that Congress envisioned only one crime when it enacted § 922(o).

Husain's convictions stem from conduct that occurred on two separate occasions. One episode involved the possession and transfer of five machineguns. The other concerned the possession and transfer of one. Common sense commands the conclusion that a possession conviction involving a particular firearm cannot be sustained in the wake of a conviction for the transfer of that same weapon. There is no significant difference between Husain's situation and that displayed in *Ball*.

How then is *Blockburger* to be applied? Surely a machinegun can be possessed without being transferred.

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[66] *Ball*, 470 U.S. at 862, 105 S.Ct at ___.

[67] *Id.* at 865, 105 S.Ct. at ___ (emphasis added).

A fact noted by the Fifth Circuit.[68] But it is impossible to *transfer* a machinegun unless one first *possesses* it. So while mere possession may be a crime unto itself, it ceases to stand alone once a transfer is alleged as part of the same transaction.

This case does not lend itself nicely to *Blockburger*, which examined conduct that Congress had criminalized in different statutes involving different actions at different times. The *Blockburger* test provides only guidance in ascertaining Congressional intent. It "must of course yield to a plainly expressed contrary view on the part of Congress."[69] And the plainly expressed Congressional intent behind the enactment of § 922(o) can be found in those cases upholding its constitutionality in the face of Commerce Clause attacks.

1. Congressional intent

"Congress created § 922 and its structure in one enactment, the Omnibus Crime Control and Safe Streets Act of 1968."[70] Section 922(o) was enacted as part of the Firearms Owners' Protection Act of 1986 in order "to strengthen the Gun Control Act of 1986 to enhance the ability of law enforcement to fight violent crime and narcotics trafficking."[71] The effective date of § 922(o) is May 19, 1986. "Thus, transfer or possession of a

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[68] *See* Appendix at page 11.

[69] *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2412 (1985).

[70] *United States v. Munoz-Romo*, 989 F.2d 757, 759 (5th Cir. 1993).

[71] *See United States v. Beuckelaere*, 91 F.3d 781, 784 (6th Cir. 1996), *quoting* H.R.Rep. No. 495, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327.

machinegun is unlawful under this section only if it was manufactured or illegally transferred after May 19, 1986."[72] And "there could be no unlawful possession under section 922(o) without an unlawful transfer."[73]

It is this interplay between possession and transfer that has enabled the courts to conclude that § 922(o) is a proper exercise of Congress' Commerce Clause power. The *transfer* of machineguns in interstate commerce prompted the enactment of § 922(o).[74] The *possession* of machineguns is prohibited only insofar as they were illegally transferred.[75] Because transfer and possession are inexorably intertwined, double jeopardy concerns prohibit convictions and punishments for both.

2. No harm is necessary

The Government concedes – as it must – that "it is necessary for Husain to possess the firearms in order to transfer them."[76] And there is nothing in *Ball* requiring that a double jeopardy claim be prefaced by either an objection at trial, or by the imposition of consecutive sentences. In short, there is no demand that Husain suffer prejudice from this violation. The collateral consequences flowing from two additional felony convictions might increase Husain's sentence under a recidivist statute for a future offense, be used to impeach his credibility, or lead

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[72] *United States v. Kirk*, 70 F.3d 791, 796 (5th Cir. 1995), *reh'g en banc granted*, 78 F.3d 160 (5th Cir. 1996).

[73] *Kirk*, 70 F.3d at 796. *See also United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1996).

[74] *See Beuckelaere*, 91 F.3d at 784.

[75] *Rambo*, 74 F.3d at 952.

[76] *See* Appendix at page 11.

to a "societal stigma."[77] At bottom, the aftermath is simply too difficult to anticipate.

What can be said is that the district court penalized Husain for having put the Government to its burden on all the counts in the indictment. He was denied an adjustment for acceptance of responsibility on his guilty plea for the record-keeping violation. He was also sentenced at the maximum end of the guideline range.[78] It might well be argued that some harm has indeed been demonstrated.

3. Conclusion

There is but one punishment for § 922(o) violations. Be it possession or transfer, the maximum sentence remains the same.[79] This is a clear indication that separate harms were not envisioned. Given the Congressional intent – as articulated in the Commerce Clause cases cited above – the only conduct sought to be regulated was the transfer of machineguns after May 19, 1986. Possession just happened to be included because it immediately preceded or followed a transfer.

The holding in *Ball* is unambiguous. "One of [Husain's] convictions, as well as [his] concurrent sentence, is unauthorized punishment for a separate offense."[80] His petition should be granted so that this question of exceptional importance can be aligned with existing Supreme Court precedent.

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[77] *Ball*, 470 U.S. at 865, 105 S.Ct. at ___.

[78] *See* Appendix at page 39.

[79] *See* 18 U.S.C. § 924(a)(2).

[80] *Ball*, 470 U.S. at 864, 105 S.Ct. at ___.

II. Witness Tampering

Husain was convicted of witness tampering in violation of 18 U.S.C. § 1512(b)(3). The indictment alleged that he *corruptly* attempted to persuade Ray Morgan to withhold information from the ATF about the possession of machineguns.[81] The statute makes it unlawful for any person to:

> knowingly use[ ] intimidation or physical force, threaten[ ], or corruptly persuade[ ] another person, or attempt[ ] to do so, or engage[ ] in misleading conduct toward another person, with intent to –
>
> * * *
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .

The phrase *corruptly persuades* is not defined in this statute. But 18 U.S.C. § 1515(a)(6) explains that the term "does not include conduct which would be misleading conduct but for a lack of a state of mind." The quest, of course, is to confine the phrase within a definite boundary. Only then can the limits of its operation be properly assessed.

The Third Circuit regards *corruptly persuades* as ambiguous.[82] The court was, however, able to articulate what it does not connote. "[T]he phrase *cannot* mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation

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[81] *See* Appendix at page 33 (count seven of the indictment).

[82] *United States v. Farrell*, 126 F.3d 484, 487 (3rd Cir. 1997).

would render the word 'corruptly' meaningless."[83] And "[t]he Supreme Court has cautioned that courts should give meaning to all statutory terms, especially those that 'describe an element of a criminal offense.' "[84]

Holding true to this directive, the Third Circuit examined the legislative history of § 1512(b), but found little to illuminate the meaning of *corruptly persuades*. It did note language from a House Report about the statute's purpose: "It is intended that culpable conduct that is not coercive or 'misleading conduct' be prosecuted under § 1512(b)."[85] Again, the court's goal was frustrated because no definition of *culpable conduct* was provided.[86]

Unable to reach a definitive answer, the Third Circuit was nevertheless confident enough to surmise that *corruptly persuades* does *not* include an attempt to coax a coconspirator – who enjoys a Fifth Amendment right – to refrain from disclosing incriminating information to federal investigators.[87]

> We read the inclusion of "corruptly" in § 1512(b) as necessarily implying that an individual can "persuade" another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so "corruptly." Thus, more culpability is required for a statutory violation than that involved in the act of attempting

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[83] *Farrell*, 126 F.3d at 487 (emphasis added).

[84] *Id.*, quoting *Ratzlaf v. United States*, 510 U.S. 135, 141, 114 S.Ct. 665, 659 (1994).

[85] *Farrell*, 126 F.3d at 488, quoting H.R.Rep. No. 100-169, at 12 (1987).

[86] *Id.*

[87] *Id.*

to discourage disclosure to hinder an investigation.[88]

In arriving at this result, the court specifically rejected an approach that would have defined *corruptly* as *motivated by an improper purpose*. This suggestion came from the thoughtful dissent of Judge Campbell, and is derived from the use of *corruptly* in 18 U.S.C. § 1503.[89]

The Second Circuit has also visited the dim parameters of witness tampering. In *Thompson*,[90] the court entertained a First Amendment challenge to § 1512(b). It ultimately rejected the notion that by criminalizing corrupt persuasion, the statute impermissibly infringed upon free speech rights. The prohibition of corrupt persuasion "is clearly limited to . . . constitutionally unprotected and purportedly illicit activity."[91] So § 1512(b) does not prevent innocent conduct or lawfully protected speech. And this remains true even if such speech has the effect of hindering an investigation. *Corruptly* therefore adds a vital dimension to § 1512(b) – an observation clearly grasped by the Third Circuit.

The District of Columbia Circuit has likewise joined the discussion. In *Poindexter*,[92] some valuable guidance was provided on the meaning of *corrupt persuasion*. That case interpreted 18 U.S.C. § 1505, which prohibits obstructing proceedings before congressional committees. The defendant was charged with obstructing justice by

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88 *Farrell*, 126 F.3d at 489.

89 *Id.* at 492-493 (Campbell, J. dissenting).

90 *United States v. Thompson*, 76 F.3d 442 (2nd Cir. 1996).

91 *Id.* at 452, quoting *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985).

92 *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021, 113 S.Ct. 656 (1992).

lying to Congress – an act that, according to the government, constituted *corrupt persuasion*. The majority held that the term *could not* be extended to encompass simple lying to a congressional committee.

The court explained that *corruptly* has both a transitive and intransitive meaning. The transitive meaning encompasses persuading another by means of corruption or bribery. The intransitive involves persuading wickedly or immorally. *Poindexter* endorsed the transitive meaning to avoid a potential for unconstitutional vagueness. This interpretation was consistent with the other words in the statute, which were also transitive (*i.e.*, "by threats," "by force," etc.). And finally, the court found that *corrupt persuasion* could not be cabined by saying that the term covered "influencing another to act immorally or improperly," as that simply substitutes one indefinite term for another.[93]

Poindexter decided that *corrupt persuasion* is " 'corrupting' another person by influencing him to violate his legal duty."[94] The core of the statutory proscription is aimed at a person who, "for the purpose of influencing the inquiry, influences another person (through bribery or otherwise) to violate a legal duty."[95]

What can be distilled from this debate is that *corruptly persuades* is a slippery brute indeed. Its meaning is often propelled by an *ad hoc* application to individual cases. That it can be outcome-determinative is disturbing, and underscores the need for a more stable definition. But at a minimum, "[s]imply making a false statement to a potential witness is a far cry from any generally

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[93] *United States v. Poindexter*, 951 F.2d at 379.

[94] *Id.*

[95] *Id.* at 385.

accepted meaning of 'corrupt influence' or 'corrupt persuasion.' "[96] "[A]nd if there is a fair doubt as to whether the [defendant's] conduct is embraced within the prohibition, the policy of lenity requires that the doubt be resolved in favor of the accused."[97]

Here, the evidence merely revealed that Husain contacted Ray Morgan and asked him not to say anything to the ATF about his (Husain's) involvement with machineguns. There is no proof regarding threats, force, bribery, extortion or other means of corrupt persuasion which would tend to show that he intended to obstruct or interfere with the administration of justice.[98] And there was absolutely no evidence that Ray Morgan was either a witness or a prospective witness.

The court disposes of Husain's argument by referring to the jury charge.[99] Its definition of *corruptly* permitted the jury to convict on less than the more nefarious meanings chronicled in the cases cited above. It in fact used the phrase *motivated by an improper purpose* – a characterization that was specifically rejected by the Third Circuit in *Farrell*. So even though "the evidence is not overwhelming, . . . it is sufficient to show that Husain attempted to corruptly persuade Morgan within the definition given by the district court. . . . "[100]

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[96] *United States v. Aguilar*, 21 F.3d 1475, 1485-1486 (9th Cir. 1994).

[97] *United States v. Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985), *citing United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). *See also, United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978).

[98] *See* Appendix at page 15.

[99] *Id.*

[100] *See* Appendix at page 16.

But under the charge, the jury was still required to find that Husain's "attempts to persuade were motivated by an *improper purpose.*"[101] And an *improper purpose* can easily be construed to fall within the category of *corruptly persuades,* as that phrase is profiled in *Poindexter.* So the sufficiency of the evidence should be measured by the *Poindexter* standard. And even if that criterion is not utilized, Husain's behavior falls well beyond any sensible theory of what *can* be considered *corrupt.*

For example, Husain's purpose could hardly be corrupt since the witness, Ray Morgan, had already spoken with the ATF about the case.[102] "The only evidence [Husain] reasonably could believe that [Morgan] possessed and which he could have been endeavoring to suppress had already been communicated to the [ATF]."[103]

There simply was nothing to obstruct. Equally important is that Morgan admitted to possessing, firing, and transferring at least one machinegun. But *Farrell* teaches that the culpable conduct condemned by § 1512(b)(3) does not include a noncoercive attempt to persuade a potential codefendant to refuse to disclose information about his or someone else's actions.[104]

Having made detailed reference to the jury charge to dispose of Husain's *corruptly-persuades* challenge, the Fifth Circuit curiously retreats to the language of the statute when meeting his concern about whether Morgan was a witness or a potential witness. According to the court's interpretation of the statute, "it would be illogical

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[101] *See* Appendix at page 15.

[102] *See* Appendix at page 15.

[103] *United States v. San Martin,* 515 F.2d 317, 321 (5th Cir. 1975).

[104] *See Farrell,* 126 F.3d at 489.

to infer a requirement that there be evidence that the person was a witness at the time of the offense."[105] But the jury was instructed that the government was required to prove that "the defendant corruptly persuaded or attempted to corruptly persuade the person named in the indictment *as a witness*."[106] The court nowhere mentions this command. And there is no testimony that Ray Morgan was a witness in this case when Husain contacted him.

The Court should grant review so that Husain's sufficiency claims can be measured according to an unambiguous definition of *corruptly persuades*. This is an issue of unquestioned importance. Its proper disposition is essential to the uniform administration of justice in witness tampering cases. The conflict amongst the circuits should be resolved.

III. Sentencing – Number of Firearms

Husain's total offense level was increased by five levels because it was determined that his conduct involved 27 firearms. This figure was calculated in the following manner:[107]

- In 1993, Ray Morgan allegedly observed Husain with 3 fully automatic firearms;
- In 1994, Husain delivered 6 automatic firearms to Ray Morgan;
- 12 firearms were seized from Husain in connection with his failure to maintain proper records;

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[105] *See* Appendix at page 14.

[106] *Record on Appeal*, Vol. 2 at page 199 (Jury Instructions) (emphasis added).

[107] *See* Appendix at page 19.

- 6 automatic firearms were seized from codefendant Abdulhady as a result of this investigation.

The five-level enhancement was premised exclusively on U.S.S.G. § 2K2.1(b)(1), entitled *Specific Offense Characteristics*. It provides that the base level will be increased *"[i]f the offense* involved three or more firearms . . . " The emphasized phrase is key. It refers to the offense of conviction. *Relevant conduct* is not mentioned. U.S.S.G. 1B1.3 (Relevant Conduct) is nowhere referenced. The PSR relies solely on § 2K2.1(b)(1) to explain the increase. The problem is whether firearms outside the scope of the charged offense can be considered when calculating a § 2K2.1(b)(1) enhancement.

The plain language of § 2K2.1 indicates that such weapons cannot be used to enlarge the guideline range. And the rationale behind this argument is apparent. A Section 2K2.1(b)(1) increase applies only to firearms involved with the charged offense, and § 1B1.3 is available to address whatever relevant conduct may exist. It would not make much sense to have two provisions covering the same ground. This result is supported by the Application Notes:

> For purposes of calculating the number of firearms under subsection (b)(1), *count only* those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.[108]

The Fifth Circuit notes that the testimony advanced at trial "constitutes an adequate evidentiary basis for the

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[108] *See* U.S.S.G. § 2K2.1, Application Note 9 (emphasis added).

district court's determination" – and then faults Husain for not attempting to rebut this evidence.[109] But the *rebuttal* comes from the legal argument advanced above – a claim that the court completely neglected to address.

Even assuming that additional firearms could be added under relevant conduct, the court fails to explain how twelve of those firearms – *i.e.*, the ones forfeited in a civil proceeding – could properly be counted. The PSR does not even suggest that the twelve firearms seized from Husain's house were prohibited weapons or otherwise illegal.[110] Quite to the contrary, they were confiscated as a result of record-keeping violations, and not because they were unlawfully obtained, possessed, or distributed. They simply cannot be utilized to enhance the sentence.[111]

Those twelve firearms were in no way involved with the offense of conviction. Nor were they "part of the same course of conduct or common scheme or plan as the offense of conviction."[112] Apart from the technical record-keeping violation – which speaks to Husain's conduct and not the character of the guns – the possession of the twelve non-machineguns was not a federal crime, let alone one involving the same conduct as the offense of conviction.[113]

Although raised, the Fifth Circuit did not consider this argument in its opinion. Yet it is obviously one of

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[109] *See* Appendix at page 20.

[110] PSR at ¶ 11, page 4.

[111] *See* U.S.S.G. § 2K2.1(b), Application Note 9.

[112] *See* U.S.S.G. § 1B1.3(a)(2).

[113] *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099 (1983)(forfeiture is an *in rem* action that is viewed as a civil proceeding).

exceptional importance. And there exists case-law from the Second Circuit which portends its proper resolution.

In *Ahmad*,[114] the defendant possessed seven firearms, which according to the government were prohibited by state and local law. But these weapons were not forbidden by federal law. So they could not be used in calculating the number of firearms involved for sentencing purposes because they were not relevant to the *offense of conviction*.[115]

Before leaving this arena – and still assuming that relevant conduct is in play – a few words need to be said about the remaining nine firearms that were used to enhance Husain's sentence. The question is whether there is an adequate evidentiary basis to warrant their inclusion as relevant conduct.

Every defendant has an unquestioned "right to be sentenced upon information which is not false or materially incorrect."[116] A district court must therefore "take pains to base sentencing judgments upon reliable and accurate information."[117]

When confronted with an objection to the PSR's findings, " 'the party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment by a preponderance of relevant and sufficiently reliable evidence."[118] And while factual recitations contained in the PSR can generally be relied upon by the sentencing judge, such recitations – especially when they

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[114] *United States v. Ahmad*, 202 F.3d 588 (2d Cir. 2000).

[115] *Id.* at 592.

[116] *United States v. Berzon*, 941 F.2d 8, 18 (1st Cir. 1991).

[117] *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993).

[118] *United States v. Elwood*, 999 F.2d 814, 817 (5th Cir. 1993), *quoting United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990).

are no more than conclusory statements – "do not acquire the patina of reliability by mere inclusion in the [report]."[119] So when a case proceeds to trial, the court should rely on trial testimony, rather than the PSR, in determining the base offense level.[120]

It is not evident that the three firearms exhibited to Morgan in 1993 were different from the six allegedly delivered to him in 1994. There is no proof that the six firearms – which are the subject of this prosecution – are separate from the nine that were shown to Morgan. To say that they are is pure speculation. The record indicates that they may well be the very same guns he sold to Husain.[121] Even the prosecutor said that the six firearms seized in this case were purchased by Husain back in 1993.[122] So it is quite possible that these six were part of the same nine shown to Morgan.

The curious aspect of this contention is that it ultimately does not matter if the firearms shown to Morgan are the same as the six seized in connection with Husain's prosecution. No matter what their character, it remains that they were displayed to Morgan approximately four to five years prior to Husain's trial.

The complete lack of temporal proximity renders the Morgan episodes too remote to be sufficiently related to the main offense for relevant conduct purposes.[123]

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[119] *Elwood*, 999 F.2d at 818.

[120] *United States v. Phillippi*, 911 F.2d 149, 151 fn.2 (8th Cir. 1990).

[121] *Record on Appeal, Vol. 4 at page 118.*

[122] *Record on Appeal, Vol. 2 at page 86.*

[123] *See United States v. Miller*, 179 F.3d 961, 966-967 (5th Cir. 1999)(four-year span is too long). *See also, United States v. Mankiewicz*, 122 F.3d 399, 405 (7th Cir. 1997)(five-year hiatus is too remote).

And as the proximity lengthens, the regularity disappears, since there is no evidence that the conduct was perpetuated during the considerable time span.[124]

But most important, Morgan testified that he test-fired only one of the six guns that Husain brought to him. There is absolutely no evidence that the other eight were fully automatic.[125]

Husain was not accountable for any more than the six machineguns which formed the basis of this prosecution. The base offense level should have been increased by two levels – and no more.[126] The Court should grant consideration and confront the issues presented by Husain's sentencing – each of which is exceptionally important and requires the reconciliation of many opinions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[124] *See United States v. Wall*, 180 F.3d 641, 646 fn. 6 (5th Cir. 1999)("Nor is there a pattern of regularity in light of the lengthy separation between the 1992 offense and the 1996 and 1997 offenses and the lack of evidence of any illicit conduct between the two").

[125] *Record on Appeal*, Vol. 4 at page 117.

[126] *See* U.S.S.G. § 2K2.1(b)(1)(B).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21151

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAZA HUSAIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
H-98-CR-105-1

(Filed Dec. 5, 2000)

Before BARKSDALE and BENAVIDES, Circuit Judges.*

BENAVIDES, Circuit Judge:**

Defendant-appellant Raza Husain was convicted of two counts of possessing machineguns, two counts of

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* Judge Vela, District Judge of the Southern District of Texas, was a member of the panel that heard oral arguments but did not participate in the decision. This case is being decided by a quorum, 28 U.S.C. § 46(d).

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

transferring machineguns, one count of tampering with a witness, and one misdemeanor count of failure to make appropriate entry of records. The district court sentenced him to a total term of imprisonment of seventy-one months. He now appeals raising numerous arguments, including: insufficiency of the evidence; double jeopardy violations; erroneous admission of prior bad acts; failure to provide a limiting instruction with respect to the extrinsic evidence; and various sentencing errors. Concluding that he has not shown that he is entitled to relief, we AFFIRM.

I. Factual and Procedural History

Appellant Raza Husain (Husain) started his own security company in 1984. Six years later he became a licensed firearms dealer. The firearms license allowed Husain to sell firearms in general, but not machineguns.

In February of 1996, ATF Agent Tinker received information from another agent indicating that four foreign nationals were engaged in the business of selling machineguns. One of these individuals was identified as Abdulhady. The agents initiated surveillance on Abdulhady.

On February 23, Abdulhady agreed to sell a machinegun to a confidential informant. At 2 a.m. on February 24, the surveillance officers at Abdulhady's apartment observed the arrival of a vehicle registered to Husain. The driver of the vehicle exited it, opened the trunk and removed a package. Abdulhady spoke to the individual and carried the package into his apartment. The driver then reentered his car and drove away. Officer

Miller of the Houston Police Department (HPD) followed the car until a marked car could stop it and identify the driver, Husain.

Abdulhady delivered the package to the confidential informant, who tested the weapon and determined that it was a machinegun. The confidential informant paid Abdulhady $1200 for the weapon and left. The weapon was a Norinco SKS rifle bearing serial number 1500449.

On March 6, the surveillance officers observed Abdulhady's departure from the apartment and his subsequent return. Husain then arrived in his car. Once inside the security gate, a package was removed from Husain's vehicle and taken into Abdulhady's residence. It apparently took both Husain and Abdulhady to carry the package.

Agent Torres, who was operating undercover, learned that certain weapons were ready for delivery. The package was then taken from Abdulhady's residence and replaced in Husain's car about thirty minutes after it had been taken inside the apartment.

Agent Torres and Abdulhady had decided to conduct the transaction at the Fiesta parking lot located on Bellaire Boulevard, Houston, Texas. Once Agent Torres was able to confirm that the package contained machineguns, the arrest signal was given. Abdulhady was taken into custody and the agents seized five more weapons, all Norinco SKS rifles bearing the following serial numbers: 11480481, 204599, 20009321, 12037511, and 11538567.

After Abdulhady's arrest, Husain became the focus of the investigation. ATF records revealed that no machineguns were registered to Husain. Based on the previously witnessed deliveries of machineguns by Husain to Abdulhady, the agents obtained a search warrant of Husain's residence and security company. The warrant was executed on April 11, 1996.

Husain's firearms acquisition and disposition books were seized during the search. The agents reviewed the books and discovered that no information with respect to the weapons Husain had delivered to Abdulhady on February 24, 1996, and March 6, 1996 had been recorded. Among other things, the agents seized a booklet explaining how to convert a semi-automatic rifle into an automatic rifle.

After Abdulhady was convicted, he became a cooperating witness against Husain. Abdulhady had purchased numerous weapons from Husain over a four-year period. To purchase weapons, Husain would meet Abdulhady at a designated location and deliver firearms from his vehicle. Abdulhady filled out some of the required forms for Husain; however, he used incorrect names and addresses.

Husain told Abdulhady that he had a friend who knew how to convert the semi-automatic rifles to automatic weapons. Husain also instructed Abdulhady regarding how to switch the wood stocks in the firearms to plastic.

After Abdulhady's arrest, Husain counseled Abdulhady with respect to what he should tell the investigators. Specifically, Husain instructed Abdulhady to assert that the weapons were defective.

Ray Morgan was a witness against Husain at trial. Morgan also was a licensed firearms dealer. Morgan testified that Husain bought twelve Norinco rifles from him. Morgan recalled that Husain had literature illustrating the conversion of semi-automatic AK-47s to machineguns. Morgan testified that he saw Husain in possession of two machineguns on one occasion and six on another.

Morgan and Husain test-fired weapons on property owned by Morgan. Morgan fired some of Husain's machineguns. Some of them were "slam firing" in that "they would take a round into the chamber and then continue firing until the clip was empty even after the operator took his finger off the trigger."

ATF Agent Cooney testified that all of the weapons seized during the course of the investigation had been converted to fully automatic weapons. The firearms had been "modified by removing metal from the bottom of the hammer and removing the disconnector part internal to the weapon." Husain testified in his own behalf.

On the first day of trial, Husain pleaded guilty to the misdemeanor charge of failure to keep proper firearms records. Ultimately, the jury convicted Husain of two counts of unlawful possession of machineguns and two counts of unlawful transfer of machineguns and one count of tampering with a witness. The district court sentenced Husain to a total term of 71 months of imprisonment, all sentences to be served concurrently.

II. Analysis

A. SUFFICIENCY OF EVIDENCE, COUNTS 3 & 4

We review challenges to the sufficiency of the evidence to determine whether a rational trier of fact could have found that the Government proved the essential elements of the offense charged beyond a reasonable doubt. *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996). All the evidence admitted at the trial must be viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences that tend to support the verdict. *Id.*

Title 26 U.S.C. § 5845(b) defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a *single function of the trigger*." (emphasis added). Husain argues that his convictions on counts 3 and 4 of the indictment (possession and transfer of five machineguns) were not supported by the evidence because it was never established that these guns would fire automatically by a single function of the trigger.

Relying on the testimony of ATF Agent Cooney, Husain argues that the guns in question do not fall within the above-quoted statutory definition of machineguns. Specifically, Husain points out that Agent Cooney testified that when he test-fired the five guns in question, they would fire when the bolt was released and went forward, *without* the trigger having been touched.[1]

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[1] The witness testified that the gun began firing "before I could get my finger down to the trigger."

In support of his argument, Husain quotes the following language from a footnote in *Staples v. United States*, 114 S.Ct. 1793, 1795 n.1 (1994): "That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act." The evidence is insufficient to prove that the guns were machineguns, Husain argues, because there is no evidence that the guns would fire "by a single function of the trigger." Therefore, the evidence is insufficient to sustain his convictions for the possession and transfer of five machineguns.

At trial, Agent Cooney testified that the guns "are machine guns under the federal definition. They shoot automatically more than one shot without manual loading by a single function of the trigger." Agent Cooney further testified that the weapons had been "intentionally modified" to permit automatic fire.

In our opinion, Husain's argument, although perhaps clever, proves too much. Husain essentially argues that his machineguns fired more automatically than the statute requires. In any event, as previously set forth, the agent expressly testified that the machineguns he test-fired would "shoot automatically more than one shot without manual loading by a single function of the trigger." The jury was free to credit Agent Cooney's testimony as it saw fit. *See United States v. Leahy*, 82 F.3d 624, 634 n.12 (5th Cir. 1996). A rational trier of fact could have found that the government proved the essential elements of the offense charged beyond a reasonable doubt.

B. DOUBLE JEOPARDY

Husain contends that his Fifth Amendment right to be free from double jeopardy was violated by his convictions for both possessing *and* transferring the same machineguns pursuant to 18 U.S.C. § 922(o). In pertinent part, § 922(o) provides that "it shall be unlawful for any person to transfer or possess a machinegun." Husain argues that the transfer counts "necessarily included conduct consisting of possession."

Generally, counts of an indictment are multiplicitous if a single offense is charged under more than one count of an indictment. *United States v. Lankford,* 196 F.3d 563, 577 (5th Cir. 1999). "Multiplicity of an indictment must be raised as a defense pursuant to Fed.R.Crim.P. 12(b) to be preserved for appeal." *United States v. Stovall,* 825 F.2d 817, 821 (5th Cir. 1987) (citations omitted).

In the body of his brief, Husain initially states that a double jeopardy claim raised for the first time on appeal is reviewed for plain error. In a footnote, however, he provides that he objected to the possession and transfer counts in the indictment as duplicitous and multiplicitous. As such, he states that such an objection was arguably sufficient to apprise the district court of his double jeopardy claim.

In his motion to dismiss the indictment, Husain asserted that "[t]he allegations of possession in Count one and transferring in Count two are duplicious [sic] and multiplicious [sic] with respect to the allegations of possession in Count three and transferring in Count four of the indictment." That is the entire argument, *i.e.*, the possession and transfer counts of February 1996 are

duplicitous and multiplicitous with respect to the possession and transfer counts of March 1996. This objection clearly is without merit because (1) the February possession count related to a separate machinegun from the five machineguns alleged to be possessed in March; and likewise, the February transfer count related to a machinegun separate from those alleged to have been transferred in March. We do not read Husain's objection before the district court to state the same argument he now makes (that the possession counts are duplicitous or multiplicitous with respect to the transfer counts). We believe his objection failed to sufficiently apprise the district court of the specific argument Husain makes before us. Having failed to properly preserve this issue (or show cause for failing to do so), he may not now challenge his convictions as multiplicitous. *See United States v. Soape*, 169 F.3d 257, 266 & n.3 (5th Cir. 1999) (recognizing that this Court has consistently declined to review this argument for plain error).

Husain also argues that his *sentences* for both the transfer and the possession counts constitute multiple punishments in violation of the double jeopardy clause. To determine whether Congress intended to allow multiple punishments for possessing and transferring the same machineguns in violation of § 922(o), we apply the test announced in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). "[D]ouble jeopardy is not implicated if each offense at issue involves proof of at least one element not required of the other." *United States v. Palella*, 846 F.2d 977, 982 (5th Cir. 1988).

Although Husain did not make this particular objection in the district court, a complaint with respect to the multiplicity of sentences may be raised for the first time on appeal. *See Lankford*, 196 F.3d at 577. Thus, unlike his multiplicity challenge to the counts of conviction, we may review his claim of multiple sentences for plain error. *Id.*[2]

To establish plain error, a defendant must show the following: "(1) an error; (2) that is clear or plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000) (citation and internal quotation marks omitted).

Husain argues that his sentences for both transferring and possessing the same machineguns under § 922(o) violate the double jeopardy clause because the term "transfer" necessarily includes "possession." For purposes of the firearms chapter, Congress defined "transfer" as including "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of." 26 U.S.C. § 5485(j). In the context of illegal possession of firearms, we have recognized that possession may be either actual or constructive. *United States v. Smith*,

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[2] Although the district court ordered all s Husain's sentences to be served concurrently, the record indicates (and the government does not dispute) that the court imposed monetary assessments on each of the separate counts of conviction. Under those circumstances, we have held that a defendant is not precluded from raising the claim of multiplicity of sentences for the first time on appeal. *See United States v. Galvan*, 949 F.2d 777, 781 (5th Cir. 1991).

930 F.2d 1081, 1085 (5th Cir. 1991). " 'Constructive possession' " has been defined as ownership, dominion, or control over the contraband itself, or dominion or control over the premises in which the contraband is concealed." *Id.* at 1085 (emphasis in opinion).[3]

Although it is clear that transfer of a machinegun involves proof of an element not required for the offense of possession of a machinegun, it is certainly arguable that the converse is not true. *Cf. Ball v. United States,* 470 U.S. 856, 865, 105 S.Ct. 1668, 1673 (1985) (holding that although the government may obtain an indictment based on a single act that charges a felon with both receiving and possessing the same weapon, a defendant could not suffer two convictions or sentences for those offenses). Indeed, the government admits that "it is necessary for Husain to possess the firearms in order to transfer them," which arguably constitutes a concession that the offenses do not pass the *Blockburger* test. Nonetheless, we are mindful that Husain must show that the error was "plain or obvious." *United States v. Rios-Quintero,* 204 F.3d 214, 219 (5th Cir. 2000). After much research, we have been unable to find any definitive authority addressing whether transferring and possessing under § 922(o) constitute separate offenses under *Blockburger.*[4] We cannot conclude that the error was plain.

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[3] In the context of a drug offense, we have looked to the following dictionary definition of "possess" – " 'to instate as an owner . . . to have and hold as property.' " *United States v. Morgan,* 117 F.3d 849, 857 n.7 (5th Cir. 1997) (quoting Webster's Ninth New Collegiate Dictionary 718 (1984)).

[4] We have recognized that the *Blockburger* test is a rule of statutory construction and is not controlling if Congress has

Assuming *arguendo* that the error was plain, as set forth previously, such error must also affect the defendant's substantial rights. In *Meshack*, we stated that the third prong of the plain error test generally requires a defendant to show prejudice. 225 F.3d at 577. Prejudice may be shown in the context of a sentencing challenge if the error resulted in a longer sentence. *Id.* In that case, we opined that Meshack arguably could not show a violation of his substantial rights because he had a lengthier, concurrent sentence that was not challenged. *See id.* We further opined that even assuming his substantial rights were violated, we we [sic] would not exercise our discretion to correct the error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See id.* More specifically, we concluded that the fourth prong of the plain error test was not met because the defendant could "show no meaningful benefit he would receive from vacating this sentence." *Id.*

Similarly, in the instant case, again assuming Husain has shown plain error, it does not appear that he has

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indicated a contrary intent – the intent to impose cumulative punishments. *See United States v. York*, 888 F.2d 1050, 1058 (5th Cir. 1989). Of course, Hussain's convictions for possessing and transferring are violations of the *same* subsection of a statute. As set forth previously, § 922(o) provides that "it shall be unlawful for any person to transfer or possess a machinegun." The structure of § 922(o) does not indicate to us that Congress intended to separately or cumulatively punish both transferring and possessing the same machineguns. Additionally, the punishment for transferring or possessing under § 922(o) is identical. *See* § 924(a)(2) (providing that anyone who knowingly violates § 922(o) "shall be fined as provided in this title, imprisoned not more than 10 years, or both").

shown that his substantial rights were violated in light of the fact that the district court sentenced him to a term of seventy-one months on each of the five separate felony convictions – all to run concurrently.[5] Moreover, assuming Husain has shown that his substantial rights were violated, as in *Meshack*, we decline to exercise our discretion because he has failed to show that vacating two of his five, concurrent 71-month sentences would result in a meaningful benefit to him. As such, we conclude that this claim entitles Husain to no relief.

C. SUFFICIENCY OF EVIDENCE-WITNESS TAMPERING

Husain argues that the evidence is insufficient to sustain his conviction for witness tampering in violation of 18 U.S.C. § 1512(b)(3), which provides that:

> (b) Whoever knowingly uses intimidation or physical force, threatens, *or corruptly persuades another person, or attempts to do so,* or engages in misleading conduct toward another person, with intent to –
>
> > (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

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[5] The district court also sentenced Husain to a concurrent twelve-month sentence with respect to his misdemeanor conviction for failure to keep proper firearms records.

shall be fined under this title or imprisoned not more than ten years, or both.

(emphasis added).[1]

Husain argues that there is no evidence that Morgan was a witness in this case at the time of the offense of witness tampering. This argument offers Husain no succor. As set forth above, the statute prohibits, among other things, "corruptly

persuad[ing] another *person*" – it does not use the term "witness." § 1512(b) (emphasis added). Also, the statute provides that "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(e)(1). In light of the fact that a proceeding need not be instituted at the time of the offense, it would be illogical to infer a requirement that there be evidence that the person was a witness at the time of the offense.

Husain next contends that the "evidence merely revealed that [he] contacted Ray Morgan and asked him

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[6] The district court instructed the jury as follows:

> For you to find the defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:
>
> First: That the defendant corruptly persuaded or attempted to corruptly persuade the person named in the indictment as a witness;
>
> Second: That the defendant acted with the intent to prevent the communication to a law enforcement officer or judge of the United States; and
>
> Third: That such information related to the commission or possible commission of a federal offense.

not to say anything to the ATF about his involvement with machineguns." There was no proof of threats, force, bribery, extortion or other means of corrupt persuasion evidencing his intent to obstruct or interfere with the administration of justice.

In its charge, the district court provided the following definition: "To act 'corruptly,' as that word has been used in these instructions, means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose. It also means to act deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice." Husain does not take issue with this instruction on appeal.

At Husain's trial, Ray Morgan testified that in September of 1998, ATF Agent Kirk Tinker interviewed him regarding firearms and his relationship with Husain. Later that same day, Husain placed a telephone call to Morgan. Prior to this phone call, it had been approximately a year since he had contact with Husain. During this phone conversation, it became apparent that Husain was under the impression that the ATF had no evidence against him. Husain instructed Morgan "not to say anything about his involvement" with machineguns. Husain also informed Morgan that he had told the ATF that the firearms in question were defective. After Morgan informed Husain that he would not discuss the matter with him, Morgan hung up the phone. Husain called again and reurged Morgan "not to say anything." Morgan terminated the call and paged Agent Tinker. Husain called yet a third time but Morgan's wife told Husain that Morgan was not at home.

As the government asserts, the jury had before it evidence that Morgan knew of Husain's possession of machineguns and that Husain knew of an investigation as early as April 11, 1996, when his home was searched for firearms records were seized. The only topic Husain broached during the phone call with Morgan in 1998 was his possession and handling of machineguns. The evidence proves that Husain instructed Morgan not to relate information with respect to his offense conduct to ATF Agent Tinker. Moreover, Husain informed Morgan that he had told the ATF that the firearms were defective when he received them. When viewed in the light most favorable to the government, a reasonable jury could believe that Husain was attempting to corruptly persuade Morgan to corroborate his story that the guns were defective. Although the evidence is not overwhelming, we believe it is sufficient to show that Husain attempted to corruptly persuade Morgan within the definition given by the district court (*i.e.*, to act deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice). *Cf. United States v. Pofahl*, 990 F.2d 1456, 1481-82 (5th Cir. 1993) (in the context of determining whether a wife's letter to her husband urging him not to continue to cooperate with authorities constituted obstruction of justice under U.S.S.G. § 3C1.1, this Court opined that the wife's letter appeared to be prohibited by § 1512(b)).[7]

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[7] The commentary to U.S.S.G. § 3C1.1 provides as an example of conduct which warrants an enhancement for obstruction of justice "conduct prohibited by 18 U.S.C. §§ 1501-1516." U.S.S.G. § 3C1.1, comment. (N.3 (I)).

D. ADMISSION OF EVIDENCE OF PRIOR BAD ACTS

Husain next argues that the district court erred in allowing evidence that he had sold firearms to Abdulhady on prior occasions and that Ray Morgan previously had observed him in possession of machineguns. We review this evidentiary ruling for abuse of discretion. *See United States v. Richards*, 204 F.3d 177, 196-99 (5th Cir. 2000).

The government responds that the evidence was relevant in that it demonstrated Husain's knowledge and his intent to transfer machineguns as well as his reasons for failing to maintain proper records. Even assuming for purposes of this appeal that the admission of the evidence was error, we are convinced that any error was harmless because (1) the evidence of guilt is overwhelming with respect to the convictions for possessing and transferring the machineguns, and (2) the district court did charge the jury that Husain was not on trial for any act, conduct, or offense not charged in the indictment. *See Richards*, 204 F.3d at 203 (explaining that the erroneous admission of evidence requires reversal only if the evidence had a substantial impact on the verdict). Husain is not entitled to relief on this claim.

E. FAILURE TO INSTRUCT

Husain contends that the district court erred in failing to instruct the jury regarding their consideration of Husain's prior bad acts. He concedes that he made no objection; therefore, this issue is raised for the first time

on appeal and will be reviewed for plain error under Fed.R.Crim.P. 52(b).

Husain asserts that in *United States v. Diaz*, this Court held that a district court committed plain error when it failed to give a [sic] similar acts limiting instruction. 585 F.2d 116 (5th Cir. 1978). Husain's reliance on *Diaz* is misplaced. In that case, we determined that the failure of the trial court to *sua sponte* provide a limiting instruction regarding the defendant's convictions constituted plain error. Here, the complained of evidence consists of prior unadjudicated acts. *Diaz* therefore is not controlling.

This Court has explained that "failure to give limiting instructions is generally held not to be plain error." *United States v. Parziale*, 947 F.2d 123, 129 (5th Cir. 1991) (footnote and internal quotation marks omitted). In *Parziale*, a case involving the admission of prior bad acts, we concluded that there was no plain error because the trial court had instructed the jury on the burden of proof, explained the essential elements of each count, and had emphasized that the "defendant is not on trial for any act or conduct or offense not alleged in the indictment." *Id.*

Likewise, in the instant case, the district court provided Husain's jury with instructions very similar to those in Parziale.[8] Husain therefore has not demonstrated

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[8] The district court charged Husain's jury with respect to the burden of proof and the elements of the counts. The court also expressly instructed the jury as follows: "You are here to decide whether the Government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the Indictment."

that the district court committed plain error in failing to provide a limiting instruction with respect to his prior bad acts.

F. NUMBER OF FIREARMS

Husain next contends that, at sentencing, the district court erred in determining that his conduct involved a total of 27 firearms. The sentencing guidelines provide that if the offense involves anywhere from 25 to 49 firearms, increase the offense level by 5. U.S.S.G. § 2K2.1(b)(1)(E). We review a sentencing judge's application of the guidelines *de novo* and accept findings of fact unless they are clearly erroneous. *United States v. Rome*, 207 F.3d 251, 253 (5th Cir. 2000).

The district court arrived at the figure of 27 based on the following evidence at trial:

* in 1993, Ray Morgan allegedly observed Husain with 3 fully automatic firearms
* in 1994, Husain delivered 6 automatic firearms to Ray Morgan
* 12 firearms were seized from Husain in connection with his failure to maintain proper records
* 6 automatic firearms were seized from codefendant Abdulhady as a result of the investigation

Husain objected to this determination in the presentence report (PSR). Citing the record, he makes the following arguments challenging the factual finding:

> Even if Ray Morgan is believed, there is no evidence that the six firearms, which are the

> subject of this prosecution, are different from those that were exhibited to Morgan some five years earlier. In fact, it may well be that they were the very same guns that he sold to Husain. Nor is it evident that the three firearms possessed in 1993 were different from those allegedly brought to Morgan's house in 1994. Moreover, Morgan testified that he test-fired only one of the six guns that Husain brought to him, so there is no evidence that the other eight were fully automatic (*i.e.*, machineguns).

If a district court has relied on information in a PSR, the defendant bears the burden of demonstrating that the information is unreliable or untrue. *Rome*, 207 F.3d at 254. If a defendant proffers no rebuttal evidence, the facts contained in the PSR may be adopted without further inquiry so long as there is an adequate evidentiary basis. *Id.*

Here, the district court relied on evidence from the trial and the PSR, *e.g.*, testimony of codefendant Abdulhady and witness Ray Morgan. Such testimony constitutes an adequate evidentiary basis for the district court's determination. Thus, Husain had the burden of rebutting such evidence.

The transcript of the sentencing hearing provides that Husain made the same challenges to the finding of 27 firearms that are quoted above. When Husain objected that the government had not carried its burden of showing that there were actually 27 different firearms, the district court inquired as follows: "Tell me what you have, that [shows] they are different." In response, counsel stated that it was the government's burden to adduce evidence that distinguishes the weapons.

The court overruled Husain's objections, ruling as follows:

> And with respect to speculation about whether or not the firearms that were shown later were duplicates of firearms that were part of the offense conduct related to the crime in this case, the Court finds that a preponderance of the evidence supports the idea that these were separate weapons, given the amount of time between each of the events listed in separately identified paragraphs, and these separately identified events in terms of the weapons that were delivered and were shown to persons who testified in this case, in that the total number of 27 accurately reflects the number of weapons that were involved in this case and that were supported by the preponderance of the evidence in this case.

Husain argued before the district court (and now) that the government had the burden of showing that there were 27 firearms. He is correct to the extent that the government had the initial burden of making such a showing. However, as set forth previously, once the district court made a finding based on an adequate evidentiary basis, it became Husain's burden to come forth and rebut it. The sentencing transcript indicates he failed to do so because he relied on his mistaken belief that the government had failed to shoulder its burden. Husain has not shown that the district court clearly erred in crediting the testimony and concluding that there were 27 firearms.

H. ACCEPTANCE OF RESPONSIBILITY

Husain argues that the district court erred in denying him a reduction in his offense level for acceptance of responsibility. We have reviewed a district court's refusal to credit acceptance of responsibility under three different (at least semantically) standards: clear error, without foundation, and with great deference. *See United States v. Siebe*, 58 F.3d 161, 163 (5th Cir. 1995). There appears to be no practical difference among them, however. *Id.* In any event, the sentencing guidelines provide that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." *Id.*; U.S.S.G. § 3E1.1 (commentary).

Husain points to the fact that at the conclusion of the first day of trial, he pleaded guilty to count five, which alleged failure to keep proper records with respect to the firearms. Of course, this ignores the fact that he put the government to its burden of proof on the remaining counts of the indictment. Although the "fact that a defendant may exercise his right to a trial by jury is not a reason for denying the two points, . . . the fact that a defendant has never admitted to violating the law is sufficient reason." *Siebe*, 58 F.3d at 163. In his brief before this Court, he argues that there was insufficient evidence to sustain his convictions for possessing and transferring machineguns. Such an argument indicates that he has not accepted responsibility for the offense conduct. *See United States v. Becerra*, 155 F.3d 740, 758 (5th Cir. 1998) (indicating that defendant was not entitled to reduction for acceptance of responsibility, despite whatever assistance he may have provided to government pre- and post-trial,

inasmuch as defendant's counsel contended in closing argument that defendant was innocent and defendant challenged sufficiency of evidence on direct appeal).

The probation officer noted in the addendum to the PSR that Husain had yet to accept responsibility for the charged offenses, and the district court adopted the factual findings in the PSR. Moreover, the district court expressly found that Husain committed obstruction of justice. Husain has not shown that this is one of those "extraordinary cases" in which adjustments for both obstruction of justice under U.S.S.G. § 3C1.1 and acceptance of responsibility under U.S.S.G. § 3E1.1 would be appropriate. *See United States v. Rodriquez*, 942 F.2d 899, 903 (5th Cir. 1991). Under these circumstances, Husain, who had the burden of establishing that he was entitled to the reduction, has not demonstrated that the district court erred in denying him a reduction for acceptance of responsibility.

G. Whether Additional Firearms Affected Offense Level

Finally, Husain asserts that the district court erroneously sustained the following objection by the government at sentencing: "The United States objects to the failure of the report to reflect the additional machine guns that were testified about as having been exchanged between the defendant and [codefendant Abdulhady]." The Court then responded that it:

> believe[d] that the United States is right on that issue in that those additional firearms should have been included in the count, but even

> adding 18 to that 27, that still brings it to a total of [45], which doesn't change the number of points that would be attributable to that number of firearms under [the guideline], since he was already above 25 and Subsection E is 25 to 49, which adds five points to the offense level, he's still within that same range, so it doesn't have any ultimate impact on the offense level, but it is information that I believe should have been properly included within the report.

As set forth previously, the guideline in question provides that if the offense involved between 25 and 49 firearms, increase the offense level by 5. *See* U.S.S.G. § 2K2.1(b)(1)(E). The PSR provided that there were 27 firearms involved and the government objected, arguing that the evidence demonstrated that an additional 18 firearms were involved. As quoted above, Judge Gilmore sustained the objection, but noted that adding 18 firearms would bring the amount to 45, which does not affect the offense level.

As previously determined, Husain has not shown the district court clearly erred in finding that 27 firearms were involved. Accordingly, because 18 additional firearms makes no difference in his offense level, any error would be harmless. *See United States v. Ramos*, 71 F.3d 1150, 1158 n.27 (5th Cir. 1995) (explaining that any error with respect to increase in offense level for possession of firearms would be harmless because the guideline range remained the same).[9]

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[9] We also reject Husain's argument that the district court erred in denying his motion for new trial without a hearing. We conclude that the district court did not abuse her considerable

For the above reasons, the district court's judgment is AFFIRMED.

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discretion for the following reasons: (1) the "newly discovered evidence" of a memo was not material; (2) an apparent lack of due diligence with respect to obtaining C.E. Anderson's report; and (3) the impeachment evidence probably would not have produced an acquittal. *See United States v. Sullivan*, 112 F.3d 180, 183 (5th Cir. 1997) (discussing standard for review of motion for new trial).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21151

D.C. Docket No. H-98-CR-105-1

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RAZA HUSAIN

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before BARKSDALE and BENAVIDES, Circuit Judges.*

J U D G M E N T

(Filed Dec. 5, 2000)

This cause was considered on the record on appeal and was argued by counsel.

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* Judge Vela, District Judge of the Southern District of Texas, was a member of the panel that heard oral arguments but did not participate in the decision. This case is being decided by a quorum, 28 U.S.C. section 46(d).

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: Feb. 6, 2001

OP-OA-J-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21151

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

RAZA HUSAIN

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 14, 2001)

(Opinion 12/05/00, 5 Cir., ___, ___ F.3d ___)

Before BARKDSALE and BENAVIDES, Circuit Judges.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested

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* Judge Vela, District Judge of the Southern District of Texas, was a member of the panel that heard oral arguments but did not participate in the decision. This case is being decided by a quorum, 28 U.S.C. § 46(d).

that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Mr Colin Bryan Amann
Gaither & Amann
4300 Scotland
Houston, TX 77007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	Criminal No. H-98-105-8
v.	§	
RAZA HUSAIN	§	

SUPERSEDING INDICTMENT

(Filed 9/23/98)

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about February 24, 1996, in the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, did knowingly and unlawfully possess, a machine gun, that is, a Norinco, SKS, 7.62 x 39mm machine gun.

In violation of Title 18, United States Code, Sections 922(o) and 924(a)(2).

COUNT TWO

On or about February 24, 1996, in the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, did knowingly and unlawfully transfer to another, a machine gun, that is, a Norinco, SKS, 7.62 x 39 mm machine gun.

In violation of Title 18, United States Code, Sections 922(o) and 924(a)(2).

COUNT THREE

On or about March 6, 1996, in the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, did knowingly and unlawfully possess, five (5) machine guns, each one a Norinco, SKS, 7.62 x 39mm machine gun.

In violation of Title 18, United States Code, Sections 922(o) and 924(a)(2).

COUNT FOUR

On or about March 6, 1996, in the Houston Division of the Southern District of Texas.

RAZA HUSAIN

defendant herein, did knowingly and unlawfully transfer to another, five (5) machine guns, each one a Norinco, SKS, 7.62 x 39mm machine gun.

In violation of Title 18, United States Code, Sections 922(o) and 924(a)(2).

COUNT FIVE

On or about March 1996, and on or before April 11, 1996, within the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, a licensed firearms importer, did knowingly fail to make appropriate entry in and did fail to properly maintain a record he was required to keep pursuant to Title 18, United States Code, Section 923, that is, he failed to note in his records, the name, age, and place of residence of the person to whom he sold and transferred firearms.

In violation of Title 18, United States Code, Sections 922(m) and 924(a)(3)(B).

COUNT SIX

On or about July 10, 1996, in the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, did knowingly and corruptly attempt to persuade another person, Abdulhady Abdulhady, with intent to influence his testimony in an official proceeding, in that defendant RAZA HUSAIN encouraged Abdulhady Abdulhady to make a false affidavit, contrary

to a statement Abdulhady Abdulhady had given to a federal agent, in order to ultimately suppress evidence found in a search authorized by a Federal search warrant which was, in part, based on Abdulhady Abdulhady's statement to the agent.

In violation of Title 18, United States Code, Section 1512(b)(1).

COUNT SEVEN

On or about September 16, 1998, in the Houston Division of the Southern District of Texas,

RAZA HUSAIN

defendant herein, with intent to prevent the communication to a law enforcement officer of the United States, information relating to the commission or possible commission of a Federal offense, did knowingly and corruptly attempt to persuade another, Ray Morgan, to withhold information from a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, relating to the unlawful possession of machine guns.

In violation of Title 18, United States Code, Section 1512(b)(3).

A TRUE BILL:

/s/ [Illegible]
FOREPERSON OF THE
GRAND JURY

APPROVED:

JAMES H. DeATLEY
United States Attorney

BY: /s/ Gary L. Cobe
Gary L. Cobe
Assistant United States Attorney
910 Travis, Suite 1500
P.O. Box 61129
Houston, Texas 77208
(713) 567-9386

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	**CRIMINAL ACTION NO.**
VS.	§	**H-98-105**
RAZA HUSAIN	§	

VERDICT

Count One

We, the jury, find the Defendant Raza Husain Guilty, of the offense charged in
("Guilty" or "Not Guilty")
Count One of the Indictment.

Count Two

We, the jury, find the Defendant Raza Husain Guilty, of the offense charged in
("Guilty" or "Not Guilty")
Count Two of the Indictment.

Count Three

We, the jury, find the Defendant Raza Husain Guilty, of the offense charged in
("Guilty" or "Not Guilty")
Count Three of the Indictment.

Count Four

We, the jury, find the Defendant Raza Husain Guilty, of the offense charged in
("Guilty" or "Not Guilty")
Count Four of the Indictment.

* * *

Count Seven

We, the jury, find the Defendant Raza Husain Guilty, of the offense charged in
("Guilty" or "Not Guilty")
Count Seven of the Indictment.

CERTIFICATE

We the jury, have made the above findings as indicated, and herewith return same into Court as our verdict.

12-3-98 /s/ [Illegible]
DATE FOREPERSON

United States District Court
Southern District of Texas
Holding Session in Houston

UNITED STATES OF AMERICA

v.

RAZA HUSAIN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
4:98CR00105-001

Michael Ramsey
Defendant's Attorney

[ ] See Additional aliases-Sheet

THE DEFENDANT:

[✓] pleaded guilty to count(s) SS on December 1, 1998.

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[✓] was found guilty on count(s) 1S-4S and 7S on December 1, 1998 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 922(o) and 924 (a)(2)	Possession of a machine gun	02/24/1996	1S, 3S
18 U.S.C. § 922(o)(a)(2)	Transfer of a machine gun	02/24/1996	2S, 4S
18 U.S.C. §§ 922(m) and 924(a)(3)(B)	Failure to make appropriate entry of records	04/11/1996	5S

[✓] See Additional Counts of Conviction-Sheet 1.01

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 455-47-2511

Defendant's Date of Birth: 05/12/1959

Defendant's USM No.: 79193-079

Defendant's Residence Address:
3207 Hazy Park Drive

Houston TX 77082

Defendant's Mailing Address:
3207 Hazy Park Drive

Houston TX 77082

DMO

November 29, 1999
Date of Imposition of Judgment

/s/ [Illegible]
Signature of Judicial Officer

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

December 8, 1999
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1512(b)(1)	Witness tampering	09/16/1998	7S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 71 month(s).
The term consists of SEVENTY ONE (71) MONTHS as to Counts 1S through 4S and Count 7S and TWELVE (12) MONTHS as to Count 5S, all counts to run concurrently to each other.

[ ] See Additional Imprisonment Terms-Sheet

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[✓] The defendant shall surrender to the United States Marshal for this district:

[ ] ___ on ___

[✓] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] by 2 p.m. on ___
[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The term consists of THREE (3) YEARS as to Counts 1S through 4S and Count 7S and ONE (1) YEAR as to Count 5S, to run concurrently with all other counts.

[ ] See Additional Supervised Release Terms-Sheet

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

[✓] See Special Conditions of Supervision-Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) If restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not own, possess, transfer or be in the vicinity of any pistols, rifles, revolvers, shotguns, machine guns or any firearm of any nature.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$325.00		

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... _____

[ ] See Additional Terms for Criminal Monetary Penalties-Sheet

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of $0.00

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612 (g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

[ ] See Additional Victims

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✓] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment.
In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

[ ] Joint and Several

Case Number (including Defendant No.)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] See Additional Joint & Several Defendants

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

[ ] See Additional Forfeited Property-Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[✓] The court adopts the factual findings and guideline application in the presentence report except:

Paragraph 20 fails to point out the fact that the defendant did commit obstruction of justice. The Court sustains the defendant's objections to paragraphs 36 and 39. No criminal

history point should be assessed in paragraph 36 and only one should be assessed for paragraphs 37 and 38. This leaves the defendant with one criminal history point and a

[✓] See Additional Findings and Guidelines Application Exceptions-Sheet 6.01

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000.00 to $ 100,000.00

[✓] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable [sic] future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[✓] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

[ ] See Additional Reasons for Point Within Range-Sheet

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

[ ] See Additional Reasons For Departure From The Guideline Range-Sheet

ADDITIONAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

criminal category I. Government's objection 1 is sustained: The correct number of firearms should be 45. The Government's third objection regarding grounds for upward departure is also sustained.